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CONQUERED TERRITORY AND THE CONSTITUTION.

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WHEN we look back to the Hellenic world in which the science of politics was born, we there find the dominant political idea embodied in the independent city-state, which stood towards all others of its class as a sovereign commonwealth, regulating its internal affairs through its own domestic constitution. To the Greek mind the state, as the city-commonwealth, was an organized society of men dwelling in a walled city, with a surrounding territory not too large to permit its free inhabitants habitually to assemble within the limits of the city to discharge the duties of citizens. When a conquering city extended its dominion by reducing other self-governing cities to the condition of dependent allies, such allies were often permitted to enjoy local autonomy under their own constitutions, without the right to participate in any way in the political affairs of the ruling state by whose assembly the foreign relations of the alliance, if alliance it may be called, were absolutely controlled. The most favored members of the Athenian Alliance or Empire, even Chios or Mitylene, could not have a voice in the general direction of the Confederacy, for the simple reason that Greek exclusiveness rejected to the last the

idea of a fusion of any large number of cities into a single body with equal rights common to all. As the state was the city, those who went out of the city went out of the state. Therefore, according to Greek ideas, the effect of an emigration for the formation of a new settlement was an absolute political severance from the mother state, which retained no more substantial hold upon its colonies than the sentimental tie arising out of community of blood and speech and common religious rights.

Upon the soil of Italy a group of village communities grew into a single vast and independent city-state that centralized within its walls the political power of the world. Rome accomplished that marvellous result by departing from the exclusive policy of the Greek cities, which persistently refused to incorporate dependent cities by extending to them their own franchise. As it was beneath the dignity of the sovereign city to confederate with her dependents, and as the expedient of representation was then unknown, Rome entered upon a policy of incorporation, carried out by the extension of her franchise first to Italy, then to Gaul and Spain, and finally to the whole Roman world. In the end, a right so widely bestowed became, of course, utterly worthless; but the theory upon which the right was conferred was never for a moment lost sight of. The freeman who received the franchise of the Roman city could only exercise it within her own walls; it was only within the local limits of the ruling city that the supreme powers of the state could be exercised. As to the dependent and peculiar local organization known as *colonia,* it is only necessary to say that it was in the main simply a contrivance for the purpose of garrisoning conquered territory without the expense of maintaining an army in it.

The modern conception of the state as a nation, occupying a definite portion of the earth's surface with fixed geographical boundaries—the state as known to modern international law—was the outcome of the "process of feudalization" through which the Teutonic nations passed, after their settlements within the limits of the Roman Empire. The kings of the states that arose out of the wreck of the Empire of Charles the Great were kings in the new territorial sense, who stood to the lands over which they ruled as a baron to his estate, a tenant to his freehold. The form assumed by the monarchy in France was reproduced in each subsequent dominion established or consolidated, and

thus has arisen the state-system of modern Europe, in which the idea of territorial sovereignty is the basis of all international relations. When the time came for states of the new type to send out bands of emigrants to found colonies in distant lands, an entirely new conception of the relation that should bind such colonies to the mother state came into existence. Instead of the emigrants leaving the mother state behind them, they were supposed to take it upon their backs. "The notion was, where Englishmen are there is England, where Frenchmen are there is France, and so the possessions of France in North America were called New France, and one group at least of the English possessions New England."*

Although England was the last of the states of the new type to enter upon the work of colonization, she has been able to give it a wider extension than any of her competitors. According to the theory of the English constitution, the title to all newly discovered lands accrued to the king in his public and regal character, and the exclusive right to grant them resided in him as a part of the royal prerogative; "upon these principles rest the various charters and grants of territory made on this continent."† The great title-deed under which the English settlers in America took actual and permanent possession of the greater part of the Atlantic seaboard is represented by the charter granted by James I., April 10th, 1606, creating two distinct corporations as colonizing agents. The entire scheme thus outlined was based upon English law by that provision in the original charter which declared:

"That all and every the persons, being our subjects which shall go and inhabit within the said colony and plantation, and every their children and posterity, which shall happen to be born within any of the limits thereof, shall have and enjoy all liberties, franchises, and immunities of free denizens and natural subjects within any of our other dominions, to all intents and purposes as if they had been abiding and born within this our realm of England, or in any other of our dominions."

It is not therefore strange that, under the principles of the English constitution, a country subdued by an army of the Empire becomes immediately a part of the king's dominions in right of his crown, and its inhabitants, so soon as they pass under the king's protection, cease to be enemies or aliens and become sub-

* Seeley, "The Expansion of England," p. 49.
† Taney, C. J., in Martin et al. v. The Lessee of Waddell, 16 Peters, p. 409.

jects. In a word, foreign territory becomes a part of the British Empire and its inhabitants British subjects, both as to the conquering state and foreign nations, *ipso facto,* by the conquest itself, without any enabling or confirming legislation upon the part of the Imperial Parliament. As Lord Coke declared in Calvin's case, "they that were born in those parts of France that were under actual legiance and obedience were no aliens, but capable of, and heritable to, lands in England."*

The liberality with which the English constitution thus bestows citizenship and legal rights upon those under its dominion in foreign lands has ever been more than offset by the exclusive spirit that denies to all colonists the right to representation in the sovereign assembly at home which directs the affairs of the Empire as a whole. That assembly, while denying to all colonists the boon of being heard through their representatives, has ever claimed the right to invade the jurisdiction of all colonial assemblies in order to legislate directly upon internal colonial concerns. In the gorgeous language of Burke, the English Parliament is clothed with "an Imperial character, in which, as from the throne of heaven, she superintends all the several inferior legislatures, and guides and controls them all without annihilating any." In the hands of a practical, tax-loving statesman like Grenville, this imperial theory was not confined to mere supervision; in such hands, it was held to mean that the Imperial Parliament could at any moment override the acts of the colonial assemblies, without consulting their wishes at all, and tax and legislate for the people of Massachusetts and Virginia just as it could for the people of Kent and Middlesex. Out of the conflict which finally arose between the English and Colonial theories as to the practical omnipotence of the Imperial Parliament over self-governing communities beyond the four seas grew the War of the Revolution, and the severance of the English colonies in America from the mother state.

With an outline of the colonial systems, ancient and modern, of the leading European nations clearly in view, it is easier to understand the spirit and purpose with which the founders of our federal republic entered upon the task of creating and governing colonies or territories beyond the limits of their new creation. The signing of the first Constitution of the United States, em-

* State Trials, ii., 559.

bodied in the Articles of Confederation, which was submitted to the States for adoption in November, 1777, was not completed until March 1st, 1781, when Maryland finally gave it her adhesion. The long delay arose out of the refusal of Delaware, New Jersey and Maryland to enter the Confederation until the controversy was settled as to the ultimate ownership of the great Western Territory of which France had been dispossessed. Although deserted by her allies, Maryland refused to abandon her contention:

"That a country unsettled at the commencement of this war, claimed by the British crown, and ceded to it by the Treaty of Paris, if wrested from that common enemy by the blood and treasure of the thirteen States, should be considered as common property, subject to be parcelled out by Congress, into free, convenient and independent governments, in such manner and at such times as the wisdom of that Assembly shall hereafter direct."

In that way the new nationality became the sovereign possessor of "the whole Northwestern Territory—the area of the great States of Michigan, Wisconsin, Illinois, Indiana and Ohio (excepting the Connecticut reserve*)" which, under the Articles of Confederation, it had no express right either to hold or govern. Notwithstanding that fact, Congress, acting under authority clearly implied, boldly entered upon the creation of that scheme of territorial government which was embodied in the Ordinance of 1784 for the government of the Northwest Territory. In describing that famous enactment, an eminent American historian† said not long ago:

"It was our first effort at colonial government, our first attempt to rule a community not fit to become a State and enter the Union; and by it a new political institution, the Territory, was created in two grades. At the head of the committee which reported the ordinance was the apostle of liberty, the father of American democracy, the man who wrote the Declaration of Independence. If one member more than another of that committee was bound to carry out the principles of the Declaration, and seek to establish a government in strict accordance with them, that member was Jefferson. If any one man more than another could be pardoned for attempting to carry the self-evident truth to an extreme, Jefferson was that man. Yet not for a moment was he led astray by the ideals he had announced to the world as the true basis of democratic government. He and his fellow-members knew well that no popular government can stand long or accomplish much for the good of the governed which is not carefully adjusted to the wants, conditions and intelligence of the people who are to live under it. The plan presented and adopted, therefore, did not contain

* John Fiske, "The Critical Period." p. 194.
† Prof. J. B. McMaster, in The Forum of December, 1898.

one vestige of self-government till there were five thousand free white males living in the territory, and this in spite of the fact that the great majority of them would be citizens from the seaboard States and well accustomed to self-government. * * * The clear distinction between a State and a Territory, thus drawn at the very outset of our career, and the principles then established—that Congress was free to govern the depedencies of the United States in such a manner as it saw fit; that the government it granted need not be republican, even in form; that men might be taxed without any representation in the taxing body, stripped absolutely of the franchise, and ruled by officials not of their own choice—have never been departed from, and have often been signally confirmed."

In the light of that historical statement, attested by documents whose plain terms can neither be contradicted nor misconstrued, should be answered the inquiry propounded by the Hon. George F. Edmunds in his notable article which appeared in the August number of this REVIEW:

"Was the Declaration of Independence of 1776 a mere phantasm of the founders of the Republic putting forth fantastic fiction? If so, the people of the United States ought, logically, to be now a Crown Colony of Great Britain, awaiting, like the Boers, the good pleasure of Parliament and the King for such measure of liberty and justice as their masters might be pleased to bestow upon them."

While it is hard to make a commonplace, prosy response to such an apostrophe to liberty, the plain fact remains that the author of the Declaration of Independence himself—when the opportunity was presented to him to design a system of colonial or territorial government for inhabitants of contiguous territory, drawn in the main from the seaboard States—was unwilling to concede representative government at all until there were at least five thousand free white males living in the Territory. When the settlers reached that number, any free white man who had resided there the proper time, and who owned fifty acres, might take part in the election of a House of Representatives, every member of which must be possessed of a freehold of two hundred acres. Such House when assembled was authorized to nominate ten men, each possessed of a freehold of five hundred acres, of whom the President was required to commission five as legislative councillors. The House and Council so constituted could, by joint ballot, choose a delegate to represent the Territory in the national House of Representatives, where he was permitted to speak, but not to vote. This oligarchical form of territorial government created by the Continental Congress, and adopted by the first Congress under the Constitution, became the standard after

which all others since established have been closely modelled. It thus appears that Jefferson, with the words of the Declaration fresh upon his lips, had no more inclination to extend the Constitution of the mother-state to his brethren settled in outlying colonies or territories than Pericles had to extend the constitution of Athens to Chios or Mitylene. It never occurred to either that the principles of human right demanded or justified such an extension. That idea, which finds no support in the world's past history, is an over-humane afterthought of very recent times.

Strange indeed it is that the makers of the existing Constitution of the United States should have dismissed the vast subject involved in the acquisition and government of Territories with the brief provision contained in Article IV., Section 3, to the effect that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." When, in 1803, Jefferson was confronted with a lack of express power to purchase Louisiana, he fell back, after a momentary hesitation, upon the implied power necessarily incident to the nature of the government itself. In a letter addressed at the time to Mr. Gallatin, he said:

"There is no constitutional difficulty as to the acquisition of territory, and whether when acquired it may be taken into the Union by the Constitution as it now stands will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by an amendment of the Constitution."*

Jefferson believed with Walter Bagehot that:

"A constitution is a collection of political means for political ends, and if you admit that any part of a constitution does no business, or that a simpler machine would do equally well what it does, you admit that this part of the Constitution, however dignified or awful it may be, is nevertheless in truth useless."†

The purchase of Louisiana was urgent and vitally important business, which Jefferson, with the aid of Congress, so promptly dispatched that the province was taken from Napoleon for a song; and, after it had been divided, a part, corresponding very nearly to the present State of Louisiana, was named the "Territory of Orleans." To the new Territory thus formed an oligarchical form of government was given by Congress, but little in advance of that devised in the first instance by Jefferson for

* Gallatin's Writings, vol. i., p. 115.
† "The English Constitution," p. 4.

the Northwest Territory. Even the right of trial by jury was conceded with a serious restriction. During the debate on the treaty under which Louisiana was purchased, the question was raised that a discrimination was made in favor of New Orleans as against Charleston or New York, by the provision which permitted ships coming from France or Spain to enter the ports of Louisiana during a period of twelve years, without paying more duty than was exacted from vessels belonging to citizens of the United States. Such a discrimination, it was said, conflicted with Article I., Section 9, of the Constitution, which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." The short and conclusive answer to that objection was that, as the prohibition in question related only to the States and not to the Territories, any preference that might be given to the port of Louisiana was not invalid, because Louisiana was a Territory and not a State.

When, for a second time, our domain was expanded by the acquisition of Florida, under the treaty from Spain ratified October 20th, 1820, Congress, a second time refusing to recognize the duty of extending the constitutional guarantees to a territory, gave to the new acquisition in 1822 substantially the same form of government provided for Orleans in 1804. In the case of the American Ins. Co. *v.* 356 Bales of Cotton, Peters 511, the question was presented to the Supreme Court of the United States whether or no that part of the territorial government providing that the judges of the Superior Courts of Florida should hold their offices for four years conflicted with that provision of the Federal Constitution providing that "the judges of the Supreme and inferior courts shall hold their offices during good behavior, etc." In delivering the opinion, Chief Justice Marshall said that the court "should take into view the relation in which Florida stands to the United States;" that territory ceded by treaty "becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose." He further held that the judicial clause of the Federal Constitution, above quoted, had no application whatever to the organization of territorial courts, because Florida, upon the conclusion of the treaty, became a Territory of the United States, and subject to the power of Congress legislating

under the territorial clause, and outside of the constitutional guarantees.

When, for a third time, our domain was widened by the acquisition, in 1848, under the treaty of Guadalupe-Hidalgo, of a vast region inhabited by people of mixed races, with laws and customs unlike our own, the problem of territorial government became entangled with an effort to extend the limits within which slavery coould be maintained. In the course of a debate that ensued on an amendment to a certain bill offering to extend the Constitution and certain laws of the United States over the proposed Territories of Utah and New Mexico, a scene occurred of which Mr. Benton gives us the following description:

"The novelty and strangeness of this proposition called up Mr. Webster, who repulsed as an absurdity and as an impossibility the scheme of extending the Constitution to the Territories, declaring that instrument to have been made for States, not Territories; that Congress governed the Territories independently of the Constitution and incompatibly with it; that no part of it went to a Territory but what Congress chose to send; that it could not act of itself anywhere, not even in the States for which it was made, and that it required an act of Congress to put it in operation before it had effect anywhere. Mr. Clay was of the same opinion, and added: 'Now, really, I must say the idea that, *eo instanti*, upon the consummation of the treaty, the Constitution of the United States spread itself over the acquired territory and carried along with it the institution of slavery, is so irreconcilable with my comprehension, or any reason I possess, that I hardly know how to meet it.' Upon the other hand, Mr. Calhoun boldly avowed his intent to carry slavery into them under the wings of the Constitution, and denounced as enemies of the South all who opposed it."

In 1850, the year following that in which the foregoing debate occurred, the Supreme Court delivered its judgment in Fleming *v.* Page, 9 Howard, p. 603, a case arising out of an action brought against the collector of the port of Philadelphia to recover back certain duties on merchandise imported into that port from Tampico, in Mexico, during the temporary occupation of that place by the military forces of the United States. The substance of the opinion delivered by Chief Justice Taney, as stated in the head-notes, is as follows:

"The President acted as a military commander prosecuting a war waged against a public enemy by the authority of his government, and the conquered country was held in possession in order to distress and harass the enemy. It did not thereby become a part of the Union. The boundaries of the United States were not extended by the conquest.

"Tampico was therefore a foreign port, within the meaning of the act of Congress passed on the 30th of July, 1846, and duties were properly levied upon goods imported into the United States from Tampico. The administrative departments of the government have never recognized a place in a newly-acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by an act of Congress; and the principle thus adopted has always been sanctioned by the circuit courts of the United States, and by this court."

With the foregoing statements of law and of fact clearly in view, it will be more possible for the reader to thread his way through the intricate, profound and far-reaching judicial expositions of the status of our territorial possessions recently made by the Supreme Court of the United States in what are known as the "Insular Tariff Cases." After a careful study of the prevailing opinions, no substantial departure can be found from the following cardinal propositions, which, for a long time, have been regarded as fundamental: (1.) That when territory is subdued by the armies of the United States, it passes under the despotic war power of the President, as Commander-in-Chief, who, in the exercise of that power, is unrestrained by the Constitution and the laws of the United States; (2.) that when territory is thus acquired by the United States by conquest, its holding is a mere military occupation until, by a treaty of peace, the acquisition is confirmed; (3.) that when the new acquisition passes into a territorial condition, the despotic war power vested in the President, as Commander-in-Chief, is superseded by the power of Congress, which is equally unlimited, except as to such constitutional "prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place;" (4.) that until the ceded territory is admitted as a State, it is not drawn within the circle of the constitutional guarantees which apply, in their entirety, to States only.

In the case of De Lima *v.* Bidwell, the leading facts were these: The invasion of Porto Rico, begun in July, 1898, by the military forces of the United States, was suspended on August 12th by a protocol entered into between the Secretary of State and the French Ambassador on the part of Spain, providing for a suspension of hostilities, the cession of the island, and the conclusion of a treaty of peace. On October 18th Porto Rico was evacuated by the Spanish forces, and on December 10th a treaty was signed at Paris under which Spain ceded the island

to the United States. Such treaty was ratified by the President and Senate February 6th, 1899, and by the Queen Regent of Spain March 19th. On March 2d an act was passed making an appropriation to carry out the obligations of the treaty; and on April 11th the ratifications were exchanged and the treaty proclaimed at Washington. De Lima & Company sued the collector of the port of New York to recover duties alleged to have been illegally exacted, and paid under protest, upon certain importations of sugar from San Juan, in the island of Porto Rico, during the autumn of 1899 and subsequent to the cession of the island to the United States. The duties in the question were exacted under the tariff act of July 24th, 1897, commonly known as the Dingley Act, which declares that "there shall be levied, collected and paid upon all articles imported *from foreign countries*" certain duties therein specified. Unless Porto Rico was a "foreign country," within the meaning of the tariff laws, at the time these duties were levied, it was admitted that their exaction was illegal. As Congress had not acted in any manner in regard to Porto Rico prior to the exaction of the duties in question, the island certainly remained a "foreign country" as to the United States, unless it had been transformed into domestic territory solely through the forces of the treaty-making power, unaided by Congressional legislation. Prior to the announcement of the judgment in the De Lima case, it was generally assumed to be settled by the decisions of the Supreme Court that, until the status of territory so occupied, and that of its inhabitants, have been altered by adequate Congressional legislation, such territory does not cease to be foreign, nor do its inhabitants cease to be aliens, in the sense in which those words are used in the laws of the United States. That conclusion was based in the main upon the pointed declarations made in U. S. *v.* Rice, 4 Wheat., 246, and in Fleming *v.* Page, 9 How., 603. The result of the effort of Justice Brown to reverse the rule thus settled can hardly be permanent, unless he has been able to overthrow the authority of Fleming *v.* Page—first, by the assumption that the gravamen of that decision is mere *dictum;* second, by the assumption that a contrary rule was really announced in the subsequent case of Cross *v.* Harrison, 16 How., 164. Justice Gray expressed himself with sententious force as to the first assumption when he dissented from the conclusion announced by Justice Brown, upon the

ground that it appeared to him "irreconcilable with the unanimous opinion of this court in Fleming *v.* Page, 9 How., 603, 13 L. ed., 276, and with the opinion of the majority of the justices in the case, this day decided, of Downes *v.* Bidwell, 181, U. S." As to the second assumption, it is hard to understand how the conclusion reached in Fleming *v.* Page could be weakened by that announced in Cross *v.* Harrison, in view of the fact, as stated by Justice White in the case of Downes *v.* Bidwell, that the opinion in the latter case "pointedly referred to a letter of the Secretary of the Treasury directing the enforcement of the tariff laws of the United States upon the express ground that Congress had enacted laws which recognized the treaty of cession. Besides, the decision was expressly placed upon the conditions of the treaty, and it was stated, in so many words, that a different rule would have been applied had the stipulations in the treaty been of a different character." The dominant idea which seems to have driven Justice Brown to the conclusion reached in the De Lima case, as stated by himself, was that "we are unable to acquiesce in the assumption that a territory may be at the same time both foreign and domestic." Such a scruple certainly has no foundation in the general canons of international law, which even go so far as to recognize the principle that the same territory may possess, at the same moment, a belligerent and a neutral character.* The most cogent reason, however, for the re-establishment of the rule supposed, for so long a time, to have been settled in Fleming *v.* Page, is to be found in the fact that the admission of a new community into our customs union is purely a political function that should belong exclusively to the federal legislature. To bring about such a change in the application of statute law, affecting our revenue system, through judicial construction merely, is a dangerous extension of the power of judicial legislation.

The vacuum existing in the De Lima case, by reason of the lack of Congressional action, was filled by the enactment, on April 12th, 1900, of the act known as the Foraker Act, to provide temporary revenues and a civil government for Porto Rico, which took effect May 1st, 1900. The case brought by Downes against the collector of the port of New York was to recover certain duties paid under protest upon certain merchandise brought

* Hall, "International Law," p. 530, 4th ed.

thither from San Juan, in the island of Porto Rico, during the month of November, 1900, imposed under the authority of the Foraker Act. The plaintiff assailed the constitutionality of that act on the ground that it conflicts with Article I., Section 8, of the Constitution of the United States, which provides that "all duties, imposts and excises shall be uniform throughout the United States." The question thus presented was this: To what extent does the Federal Constitution apply to a Territory of the United States? The prolonged controversy on that subject, extending from the making of the present Constitution, reached a decided stage when the Supreme Court declared, in 1879, without a dissenting voice, in the case of the First National Bank of Brunswick *v.* County of Yankton, 101, U. S., 129, that:

"The territories are but political sub-divisions of the outlying dominion of the United States. They bear much the same relation to the general government that counties do to the States, and Congress may legislate for them as States do for their respective municipal organizations. The organic law of a Territory takes the place of a constitution, as the fundamental law of a local government. It is obligatory on and binds the territorial authorities; but Congress is supreme, and, for the purposes of this department of its governmental authority, has all the powers of the people of the United States, except such as have been expressly, or by implication, reserved in the prohibitions of the Constitution."

In Church of Jesus Christ of L. D. S. *v.* United States, 136, U. S., 1, the Supreme Court, speaking through Justice Bradley, said, in holding that Congress had power to repeal the charter of the church, that:

"The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. * * * Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, but those limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions."

In the case of Downes *v.* Bidwell, a bare majority of the Supreme Court, speaking through the weighty words of Justice Brown, reiterated that historic and unassailable doctrine in the declaration that:

"The power over the territories is vested in Congress without limitation, and that this power has been considered the foundation

upon which the territorial governments rest was also asserted by Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat., 316, 422, 4 L. ed., 579, 605, and in United States *v.* Gratiot, 14 Pet., 526, 10 L. ed., 573."

So far from attempting to enlarge the power of Congress over the Territories, as defined in the earlier cases, Justice Brown, in announcing the prevailing opinion in the case in question, manifested a decided inclination to narrow it, when he said:

"To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill *of that description.* * * * Whatever may be finally decided by the American people as to the status of these islands and their inhabitants—whether they shall be introduced into the sisterhood of States, or be permitted to form independent governments—it does not follow that, in the meantime, awaiting that decision, the people are, in the matter of personal rights, unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress."

While the Court was thus emphasizing the fact that the personal rights of inhabitants of Territories are guarded to some extent, at least, by such constitutional limitations "as go to the very root of the power of Congress to act at all, irrespective of time or place," it was careful to say that such provisions of the Constitution as are operative only "throughout the United States," or among the several States, are applicable to the Territories acquired by purchase or conquest only when Congress shall so direct. An incontrovertible historical fact is recognized by the statement that the existing federal Constitution was made for the "United States, by which term we understand the *States* whose people *united* to form the Constitution and such as have since been admitted to the Union upon an equality with them." The court therefore concluded that "the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case."

In view of the gravely perplexing problems of territorial gov-

ernment now pending for solution, it should be a comfort to the country to know that the Supreme Court, in the case of Downes *v.* Bidwell, has declined to take away from Congress any of the power to deal with such problems vested in it by the founders of the Republic. In their time, they were called upon to adapt colonial systems not only to the wants of their own brethren settled in contiguous territory, but also to the wants of alien and mixed races, widely different in origin, and with customs and usages unlike our own, settled in like territory. In our time, we are called upon to adapt colonial systems to alien and mixed races settled not only beyond the seas, but, in more than one instance, at points remote from our shores. Even those of our people who are neither readers of history nor students of the science of politics are beginning to understand that the silent and irresistible law of growth, which expands the girdle of the oak, is an equally irresistible law of our national life, which neither legislators, jurists, nor sentimentalists can suspend or control. The only practical question now is how to deal with the new conditions resulting from such growth. The most widely extended and fruitful colonial system that has ever existed is that possessed by the British Empire, the keystone of whose success is embodied in the application to each of its widely divergent parts of that form of government which seems best adapted to its special stage of development and to its local wants and traditions. When the English colonial system is viewed as a whole, the fact appears that it embraces almost every form of government, from that of the autocratic High Commissioner, who legislates for savage Basutoland by the issuance of proclamations merely, up to the complex federal union, under which the self-governing communities of Canada control their own destinies with scarcely any interference whatever from the parent state. Such a system never shocked the sensibilities of liberty-loving statesmen like John Bright, Wilberforce and Macaulay. Why should any American citizen feel called upon to become a more advanced champion of the rights of man than Thomas Jefferson, whose foreign policy rested upon two clearly defined principles: first, that territory shall be annexed as rapidly as the growth of the nation demands; second, that such territory shall be governed by Congress under appropriate systems, framed without reference to the special plan of liberty embodied in the Consti-

tution of the parent state. And, in his far-sighted wisdom, Jefferson by no means limited his ideas to the acquisition of contiguous territory. When he was called upon by President Monroe to define the political relations of the New World to the Old, he said in his epoch-making letter of October 24th, 1823, of which the Monroe Doctrine was born:

"But we have first to ask ourselves a question. Do we wish to acquire to our confederacy any one or more of the Spanish provinces? I candidly confess that I have ever looked on Cuba as the most interesting addition which could ever be made to our system of States. The control which, with Florida Point, this island would give us over the Gulf of Mexico and the countries and isthmus bordering on it, as well as all those whose waters flow into it, would fill up the measure of our political well-being."

Who can doubt that the realization of that prophecy is near at hand? After the Cuban people have fully availed themselves of the opportunity, now wisely and justly extended to them by the United States, of attempting the hopeless experiment of establishing and maintaining a separate nationality, they will seek a release from their sea of troubles in a petition for annexation. That result must be reached for three reasons: first, because the day of small nationalities is over; second, because the race conflict will render stable government in the island impossible; third, because the future economic prosperity of the island depends upon a favorable relation to the customs union of the United States. When our congenial neighbors, who have suffered so much, knock at our doors, we must open them wide enough to receive the Queen of the Antilles as a State according to the plan of Jefferson. Her products must pass from Havana to New York just as the products of South Carolina pass to that port from Charleston. She will then become in fact, as in name, the richest spot in the New World.

In dealing with the far-distant realm of the Philippines, inhabited by peoples alien in every way to our own, Congress should look to recent European experience in Africa for the only practical solution of the difficulties confronting us there. The one new and hopeful expedient in the interest of peace, which the partition of Africa has added to the law of occupation, is embodied in the device recently agreed upon in various forms by Great Britain, Germany, France, Italy, Portugal and other nations for the prevention of future conflicts as to boundaries. With the history of such conflicts in America to guide them, a systematic

effort has been made by many Powers to prevent their recurrence in Africa through international treaties of delimitation, which define in advance the "sphere of influence" through which the growing settlements of any given state may extend. From the sphere thus defined the dominant state has the right to exclude other European states through their own consent, thus leaving the field clear for the free development of its chartered companies and protectorates. As the Philippines have already been drawn within our "sphere of influence" in such a way as to vest in us the right to exclude all other nations, the problem is how to reduce the burden of governing them to the minimum. In order to insure to appropriated and uncivilized regions a degree of peace and order which chartered companies can hardly be expected permanently to supply, many European governments have supplemented or superseded their control by the establishment of protectorates, a rather vague and indefinite form of political organization, which differs from a colony in that the protected community neither becomes an integral part of the protecting state, nor surrenders, except to a certain extent, the right to exercise internal sovereignty. As a general rule, the Power establishing a protectorate strives to secure only such a limited control over the internal affairs of the dependent community as will enable it to discharge the external obligations assumed to foreign states. If Congress and the Executive would proceed more strictly on such lines in dealing with the Philippines, we could be saved from the unbearable burdens that will surely result from the attempt to establish there a more strictly organized colonial system than the circumstances of the case now warrant. As the entire group is safely within our "sphere of influence," our actual occupation should be limited to the coast cities, where the navy can be most effective, and where the problem of government can be reduced to the maintenance of a few municipal systems. In that way can be minimized the burden of maintaining in the interior a large army of occupation. In that way lives, treasure and the unnecessary effort to govern alien peoples, with customs and laws unlike our own, may be spared, without weakening in the slightest, as against the rest of the world, our title to a possession whose importance must increase with the growing greatness of the Pacific. HANNIS TAYLOR.